PP v. SITI NURHIDAYAH

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
YAACOB MD SAM JCA
RHODZARIAH BUJANG JCA
[CRIMINAL APPEAL NO: P-05(LB)-455-12-2016]
11 APRIL 2018

CRIMINAL PROCEDURE: *Appeal – Appeal against acquittal and discharge – Appeal by prosecution – Accused person charged for trafficking in dangerous drugs – Drugs found concealed when bag scanned at airport – Accused acquitted and discharged – Defence of innocent carrier – Whether defence probable – Whether raised reasonable doubts against prosecution's case – Dangerous Drugs Act 1952, s. 39B(1)(a)*

The respondent, an Indonesian national, was at the Penang International Airport when her luggage, upon scanning, revealed a suspicious image. According to the police officer on duty ('PW11'), the respondent looked anxious and panicky as the luggage was unlocked using the key she was holding. A search on the luggage led to the discovery of a concealed plastic package containing crystalline substance. An analysis by the chemist confirmed that the crystalline substances were 1204.5g of methamphetamine while the clothes found in the same luggage contained the respondent's DNA. The respondent was charged at the High Court for trafficking in dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). Satisfied that a *prima facie* case was established, the respondent was called to enter her defence. In her defence, the respondent submitted that (i) she was in China as she was offered a job by a fellow Indonesian, Tina, to take delivery of goods; (ii) Tina informed the respondent that a man named Destiny would contact her; (iii) the next day, Destiny came with a luggage; (iv) the respondent examined the luggage and found it to contain clothes, shoes and handbags; and (v) the respondent left for Penang the next day. On the discovery of drugs, the respondent denied the negative reaction testified by PW11. The respondent's husband and Tina testified and corroborated the defence's case. In discharging and acquitting the respondent, the High Court Judge ('the HCJ') held that (i) the respondent was an innocent carrier; (ii) since the respondent took reasonable and necessary steps to ascertain the bag's contents, she was not wilfully blind and had succeeded in rebutting the presumption under s. 37(d) of the DDA and had raised a reasonable doubt on the prosecution's case. Hence, the present appeal.

Held (dismissing appeal)
Per Rhodzariah Bujang JCA delivering the judgment of the court:

(1) Tina, the person whom the respondent said was responsible and instrumental in facilitating her travel prior to her arrest, actually came to the court to confirm that it was so. This was unlike many other drug-trafficking cases where a similar defence had been raised but where such a 'facilitator' remained just a name. It would be foolhardy for Tina to say the drug belonged to her but the inference to be deduced from her testimony was that she was in an illicit trade. Since the 'Tina' mentioned by the respondent, as the person who sent her to collect the goods which were later delivered in a luggage by Destiny, actually turned up as her witness to corroborate her evidence, it could not be ruled out that her defence was one of mere fabrication. (paras 14 & 15)

(2) The luggage did not contain new clothes, handbags and shoes, as stated by the respondent in her defence. During cross-examination, when shown the photographs, the respondent did say that the content of the luggage was not the same as seen by her in China. However, according to the airline's record, the weight of the checked-in luggage of the respondent was 20kg but from the evidence of the investigating officer, the weight of the said luggage was only 8.74kg. In view of the discrepancy in the prosecution's own evidence, it could not be said that the respondent was lying when she testified that the content of the luggage was different from the one seen by her in China. (para 17)

Bahasa Malaysia *Headnotes*

Responden, seorang warganegara Indonesia, berada di Lapangan Terbang Antarabangsa Pulau Pinang apabila bagasinya, selepas diimbas, mempamerkan imej yang mencurigakan. Menurut pihak polis bertugas ('PW11'), responden kelihatan cemas dan resah semasa kunci bagasi tersebut dibuka menggunakan kunci yang dipegangnya. Carian pada bagasi tersebut mendedahkan bungkusan plastik tersembunyi mengandungi bahan kristal. Analisis ahli kimia mengesahkan bahan kristal tersebut adalah 1204.5g methamphetamine manakala pakaian yang dijumpai dalam bagasi yang sama mempunyai DNA responden. Responden dipertuduh di Mahkamah Tinggi kerana mengedar dadah, satu kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Berpuas hati bahawa pihak pendakwaan berjaya membuktikan satu kes *prima facie*, responden dipanggil membela diri. Dalam pembelaannya, responden menghujahkan (i) dia berada di China atas tawaran kerja oleh rakan senegaranya, Tina, untuk menghantar barang; (ii) Tina memaklumkan responden bahawa seorang lelaki bernama Destiny akan menghubungi responden; (iii) esoknya, Destiny datang membawa sebuah bagasi; (iv) responden memeriksa bagasi tersebut dan menjumpai pakaian, kasut dan beg tangan; dan (v) responden berlepas ke Pulau Pinang

keesokan hari. Tentang penemuan dadah tersebut, responden menafikan reaksi negatif yang disaksikan oleh PW11. Suami responden dan Tina memberi keterangan dan menyokong kes pembelaan. Melepaskan dan membebaskan responden, Hakim Mahkamah Tinggi ('HMT') memutuskan (i) responden seorang pembawa tidak bersalah; (ii) oleh kerana responden telah mengambil langkah munasabah dan wajar untuk memeriksa kandungan beg, dia tidak melakukan kebutaan sengaja dan berjaya menyangkal anggapan bawah s. 37(d) ADB dan telah membangkitkan keraguan munasabah terhadap kes pendakwaan. Maka timbul rayuan ini.

Diputuskan (menolak rayuan)
Oleh Rhodzariah Bujang HMR menyampaikan penghakiman mahkamah:

(1) Tina, orang yang responden katakan bertanggungjawab dan penting dalam memudahkan perjalanannya sebelum dia ditahan, telah hadir di mahkamah untuk mengesahkannya. Ini tidak seperti kebanyakan kes pengedaran dadah yang pembelaan serupa dikemukakan tetapi 'pemudah cara' hanya diketahui namanya sahaja. Terlalu berani jika Tina mengatakan dadah tersebut miliknya tetapi kesimpulan yang boleh dibuat berdasarkan keterangannya adalah dia menjalankan perdagangan haram. Oleh kerana 'Tina' yang disebut oleh responden, sebagai orang menghantarnya untuk mengambil barang yang kemudian dihantar dalam bagasi oleh Destiny, sebenarnya hadir sebagai saksi yang menyokong keterangannya, tidak boleh diputuskan bahawa pembelaannya sekadar rekaan.

(2) Bagasi responden tidak mengandungi pakaian, beg tangan dan kasut baharu, seperti yang dinyatakan dalam pembelaannya. Semasa pemeriksaan balas, apabila ditunjukkan gambar-gambar, responden ada mengatakan kandungan beg tersebut tidak sama seperti yang dilihatnya di China. Walau bagaimanapun, menurut rekod pesawat, berat bagasi responden ialah 8.74kg. Berdasarkan kepincangan keterangan pihak pendakwaan sendiri, tidak boleh dikatakan responden menipu kerana dia memberi keterangan kandungan bagasi tersebut berbeza dengan yang dilihatnya di China.

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Dal Bahadur v. Bijai Bahadur AIR 1930 PC ***(refd)***
Jeanette Congcan Opena v. PP [2014] 1 LNS 508 CA ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Md Zainudin Raujan v. PP [2013] 4 CLJ 21 FC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
PP v. Herlina Purnama Sari [2017] 1 MLRA 499 CA ***(refd)***
PP v. Hla Win [1995] 2 SLR 424 ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
Roslan Sabu v. PP [2006] 3 CLJ 607 CA ***(refd)***
Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), 39B(1)(a), First Schedule

For the appellant - Jasmee Hameeza Jaafar; DPP
For the respondent - Choong Kak Sen & Selvi Sandrasegaram; M/s Gooi & Azura

[Editor's note: For the High Court judgment, please see PP v. Siti Nurhidayah [2017] 1 LNS 54 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Rhodzariah Bujang JCA:

Brief Facts Of The Case

[1] The respondent, in this appeal filed by the Public Prosecutor was discharged and acquitted by the High Court of a charge of trafficking in 1204.5g of Methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") which is punishable by death. The charge against her in Bahasa Malaysia reads as follows:

> Bahawa kamu pada 6.11.2013 lebih kurang 7.40 petang di ruang ketibaan International Lapangan Terbang Antarabangsa Bayan Lepas, Pulau Pinang, di dalam Daerah Barat Daya di dalam Negeri Pulau Pinang, telah didapati mengedar dadah berbahaya jenis Methamphetamine seberat 1204.5g, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B[2] Akta yang sama.

[2] As can be gleaned from the charge above, the respondent, an Indonesian national, who was on a Cathay Pacific flight from Hong Kong was arrested with the drug which was found concealed under her checked-in brown luggage (exh. P15) at its handle part. The discovery was made when the said brown luggage was scanned by a police officer on duty at the airport, Detective Sargeant Rosita binti Md Zuki (PW11) who saw a suspicious greenish image from the luggage. After the respondent was asked to unlock the luggage with the key which she obtained from her front short pants' pocket, its content, which were clothes and another grey coloured bag were taken out. The brown luggage was re-scanned and the same image was again seen. The respondent was then brought to the Narcotic Office at the said airport where a further examination of the luggage revealed a bulge at the same area where the greenish image was seen. When PW11 unzipped its lining, she discovered a plastic package wrapped with aluminium foil and a black sellotape hidden underneath it which upon further examination revealed crystalline substance believed to be Methamphetamine inside it. PW11 also testified that when the respondent was ordered to unlock the brown luggage she looked anxious and panicky ("cemas dan gelisah") and

when the drug was discovered she exhibited the same reactions. The respondent, said PW11 also looked shocked ("terkejut"). The respondent and the luggage with all its content were then handed over to the investigating officer of the case, Inspector Mohd Lukman bin Abdul Ghani (PW13). PW13 subsequently sent the crystalline substance to the chemist for analysis and the chemist, Raduan bin Mail (PW4) confirmed that it was Methamphetamine with a net weight of 1204.5g. Methamphetamine is listed as dangerous drugs under the First Schedule of the DDA. The clothings found in the brown luggage were sent to another chemist for DNA analysis and that chemist, Haznan bin Hashim (PW8) testified that they contained the respondent's DNA.

[3] Based on the aforesaid evidence, the learned High Court Judge found a *prima facie* case against the respondent for she was in possession of the drug and was presumed to have knowledge of it by reason of s. 37(d) of the Act. As for the element of trafficking, the learned High Court Judge held that since she was carrying the brown luggage with her in the plane from Hong Kong, that was an overt act covered by the definition of trafficking and given the huge quantity of the drug, it was not meant for her own personal consumption.

[4] Only the above salient facts are related in this judgment because the primary focus of the prosecution's appeal was the defence of the respondent which the learned High Court Judge found had rebutted the presumption of possession and knowledge under s. 37(d) of the Act as well as raising a reasonable doubt on the prosecution's case.

The Defence

[5] The respondent's defence was simply that she was offered a job by a fellow countrywoman, known to her as Tina who was introduced by her husband Andi Suhendi (DW3) to take delivery of goods, which were clothings and accessories, from Guangzhou, China for a fee of 3,000 Rupiah as she was conversant in Mandarin. She accepted the job because at that material time she had been jobless for about a year. Tina, according to the respondent, arranged for her travel documents and her flight to China on 2 November 2013 and gave her these documentations on 1 November 2013. Upon arrival in Hong Kong that night, she took a bus to Guangzhou, China and arrived there the following day and stayed in a nearby hotel. She informed Tina of her arrival there and was told by the former that an African man by the name of Destiny will contact her and he did, at around mid-morning. Destiny fetched her from the hotel and she was then brought by Destiny to another hotel where she stayed until 5 November 2013 whilst waiting for the clothes to be delivered. That morning of 5 November 2013 Destiny came with the said brown-coloured luggage. Upon receipt of the same, the respondent said she examined its content, at Tina's request and

found it to contain clothes, shoes and handbags with price tags still attached to them. Tina was then informed of the result of her examination. The next day she left for Hong Kong with the ticket given to her by Destiny to go to Penang where Tina would contact her upon her arrival.

[6] On the discovery of the drugs, she denied the negative reaction as testified by PW11 and that she did tell the police that it was on Tina's instruction that she brought the bag which she said was similarly scanned at Hong Kong International Airport and passed the security clearance there.

[7] The respondent's husband, (DW3) corroborated her evidence about her meeting with Tina who was introduced to him by a friend called Ilham Firmanshah and who offered his wife the said job. He had sent the respondent to the airport and she had contacted him upon her arrival in China and appraised him of her meeting with Destiny. More importantly, for the defence, Tina (DW2) gave evidence as the defence second witness. She too corroborated the paid assignment as well as the facts leading to the respondent's departure to Guangzhou and that the respondent was one of many others whom she engaged to deliver clothings, shoes and accessories on behalf of her ex-boyfriend, Andrew and for which Andrew paid her USD100 each time. It was Andrew who told her to tell the respondent that Destiny would be picking her up but even so, she did not tell the respondent the existence of Andrew. The respondent also informed Tina that she was told by Destiny to go to Penang and Tina, in turn, told the respondent to call her once she reached Penang but the respondent never did. Her repeated calls to the respondent all went unanswered, said Tina. It was only a month later that Andrew informed her of the respondent's arrest. Tina also vouched for the respondent's innocence, stating that the respondent was not a drug trafficker but only paid to deliver the goods as stated. For the record, when DW2 gave evidence, her name was recorded as Titin Sukmawati but she confirmed that her nickname was Tina and that she was the Tina referred to by the respondent in her evidence.

Findings Of The High Court Judge

[8] The learned High Court Judge correctly addressed his mind to the duty he had to shoulder at the close of the defence case, citing the Federal Court decision in *Md Zainudin Raujan v. PP* [2013] 4 CLJ 21; [2013] 3 MLJ 773, *Mat v. PP* [1963] 1 LNS 82; [1963] 29 MLJ 263 and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 and that since he raised the presumption of possession and knowledge against her, it must be rebutted on a balance of probabilities as held in *PP v. Yuvaraj* [1968] 1 LNS 116; [1969] 2 MLJ 89. He likewise rightly identified the defence as being one of an innocent carrier – the real traffickers being Tina and Andrew. The directions given in *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 as explained in *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773 states as follows:

That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker. This is called the *Radhi* direction and must be administered by a court unto itself when such a defence is taken. See, *Sochima Okoye v. Public Prosecutor* [1995] 3 CLJ 371 CA.

The Two Exercises

[9] Upon consideration of the evidence and given that Tina came forward to give evidence, it was clear that she was not a product of the respondent's imagination. Tina came forward to testify at "the risk of literally putting her neck on the line" and exposing herself to prosecution and the death penalty, said His Lordship. He borrowed the words of Lord Buckmaster in *Dal Bahadur v. Bijai Bahadur* AIR 1930 PC, *viz* "in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true" and came to a finding that Tina's evidence was not a mere invention or fabrication merely for the purpose of assisting the respondent – this considering the enormity of the risk undertaken by her. He also found her evidence credible because despite rigorous cross-examination, her testimony emerged largely unscathed. Furthermore, the respondent's defence corresponds in material particulars with that stated in Tina's testimony.

[10] Next, the learned High Court Judge dealt at some length with the requirements of the *Alcontara* notice as laid down in the case of the same name, *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705; [1996] 1 MLJ 209 and found, as admitted by the PW13 that the respondent had divulged the material parts of her defence at the earliest opportunity so it cannot be dismissed as an afterthought. Although she never mentioned Andrew's involvement when giving evidence, the learned High Court Judge held this was not fatal to the defence because from Tina's evidence, the respondent was not aware of Andrew's existence.

[11] Since the defence of an innocent carrier comes with it, the concept of wilful blindness as held in the Singaporean case of *Public Prosecutor v. Hla Win* [1995] 2 SLR 424 and accepted as also the law by our Malaysian case (see for example, the cases cited by the learned High Court Judge at para. 95 of the judgment, *viz*, *Roslan Sabu v. PP* [2006] 3 CLJ 607; [2006] 4 AMR 772 and *Jeanette Congcan Opena v. Public Prosecutor* [2014] 1 LNS 508), the learned High Court Judge proceeded to deal with that issue. His Lordship decided that the said concept must be assessed on an objective standard, that is

whether a reasonable person similarly circumstanced would make inquiries as to the content of the bag or package that he or she was asked to carry on behalf of another.

[12] Referring to the evidence from PW11 who agreed that the naked eye could not see anything suspicious of the brown luggage for the drug was carefully and professionally concealed so as not to arouse suspicion, that it was scanned and passed the security inspection in Hong Kong Airport and that the respondent had taken all reasonable and necessary steps to ascertain the bag's content, the learned High Court Judge found that the respondent was not wilfully blind. She has succeeded in rebutting the presumption under s. 37(d) of the Act and has raised a reasonable doubt on the prosecution case.

Grievance Of The Public Prosecutor

[13] Against the above findings, the Public Prosecutor had submitted four grounds in their memorandum of appeal which we have paraphrased as follows:

(i) The learned High Court Judge erred in finding the respondent an innocent carrier;

(ii) The learned High Court Judge erred in not considering that the respondent's conduct was inconsistent with innocence at the time of arrest;

(iii) The learned High Court Judge erred in not finding that regardless of Tina's role, that of respondent also came under the context of drug trafficking under s. 39B(1)(a) of the Act.

(iv) Based on the above failures, the learned High Court Judge had erred in not finding that the respondent's defence has failed to rebut the presumption under s. 39(d) of the Act.

Innocent Carrier

[14] The learned Deputy Public Prosecutor submitted that Tina was not the real trafficker because she was not the one who handed the brown luggage containing the drug to the respondent and she has denied knowledge about the drugs in her cross-examination and was merely assisting Andrew to look for carriers for the goods. All these evidence of hers, submitted the learned Deputy Public Prosecutor further, does not negate the fact that the respondent had prior knowledge of the drugs in the brown luggage. Despite the aforesaid denials of Tina, we are unable, with respect, to agree with the contention above for the salutary fact here is that the person whom the respondent said was responsible for and instrumental in facilitating her travel prior to her arrest actually came to court to confirm that it was so. This unlike the many other drug trafficking cases where a similar defence had been raised but where such a 'facilitator' remained just a name. Of course it would

be foolhardy for Tina to say that the drug belonged to her but the inference to be deduced from her testimony is that she and her ex-boyfriend Andrew were in this illicit trade.

[15] As to whether DW2 and Tina are one and the same person, it is true what the learned Deputy Public Prosecutor raised in her submission that the respondent never gave Tina's full name to PW13 but only did so when she took the stand but that does not mean that DW2 and Tina are not the one and same person. As said earlier, when DW2 gave evidence, she confirmed that she was the Tina referred to by the respondent in her evidence. There is nothing on the facts of the case and in the judgment of the learned High Court Judge that he held the prosecution accountable for not rebutting the *Alcontara* notice. What he said was as far as the said notice was concerned, the respondent had been consistent in her statement upon arrest that she was asked by Tina to collect the goods. And since the Tina mentioned by the respondent as the person who sent her to collect the goods which were later delivered in that brown luggage by that African man Destiny, actually turned up as her witness to corroborate her evidence, it could not be ruled out that her defence was one of mere fabrication.

[16] The learned Deputy Public Prosecutor pointed out in her submission that PW11 could see the bulge when she examined the brown luggage but it must be pointed out that this was after all its content were taken out and after she was alerted by the suspicious green image on the monitor when it was scanned. The recent Federal Court decision of *PP v. Herlina Purnama Sari* [2017] 1 MLRA 499 where the Federal Court overturned the lower court's finding that the respondent, also an Indonesian woman with a similar defence, was an innocent carrier is distinguishable on the facts. This we say because Herlina, although similarly engaged, by a friend Vivian, to pick up golden thread sarees from Laos to Indonesia made a stopover in Malaysia before flying to Laos and it was here, that is Malaysia, that the drug in two boxes were given to her by a friend of Vivian named Jo. The Federal Court held that her story was improbable because if her paid assignment was to Laos why the need to stopover in Malaysia and why did she agree to carry the boxes for a total stranger, Jo. Again, the difference in this appeal before us, we stressed is that Tina came to give evidence and as pointed out by the respondent's counsel in his submission before us, the Federal Court in *Herlina*'s case *(supra)* did acknowledge that:

> Whether the doctrine of wilful blindness should be applied to any particular case would be dependent on the relevant inferences to be drawn by the **trial judge from all the facts and circumstances of the particular case**, giving due weight, where necessary, to the **credibility of the witnesses**
>
> (see *PP v. Tan Kok An* [1995] 4 MLRH 256].
>
> (emphasis added)

[17] We do however acknowledge the truth of the learned Deputy Public Prosecutor's submission that the brown luggage does not contain new clothes, handbags and shoes as stated by the respondent in her defence, just nine pieces of garments as shown in the photographs at pp. 28-32 of the appeal record vol. 3. The respondent in her cross-examination, and when shown the said photographs did say that the content of the brown luggage was not the same as seen by her in Guangzhou. However, the respondent's counsel had in his oral submission in reply referred us to the evidence of PW6, Roslan bin Haji Abdul Rahim, the Operation Manager of Cathay Pacific, who said that according to the airline's record, the weight of the checked-in luggage of the respondent was 20kg (see his evidence at pp. 51 and 57 of the appeal record vol. 2) but yet from PW13's evidence, the weight of the said luggage was only 8.74kg (see pp. 191 of appeal record vol. 2). In view of this discrepancy shown from the prosecution own evidence, we cannot in all fairness say that the respondent was lying when she testified that the content of the luggage was different from the one seen by her in Guangzhou. The probability that the content of the luggage was tampered with was even put to PW13 during cross-examination (see p. 174 of the appeal record vol. 2). Granted that the learned High Court Judge did not mention this issue of tampering of the content of the brown luggage in his grounds of judgment but given that it was raised before us in submission we were fully entitled to resolve it based on the evidence adduced before the learned High Court Judge.

Conclusion

[18] Premised on the aforesaid considerations, the appeal was dismissed and the decision of the learned High Court Judge was affirmed.